BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LUIS ZEPEDA	)	
Claimant	)	
	)	
VS.	)	
	)	
NANCY & NORA FLORES D/B/A L&F ORIGINAL, LLP, and PYRAMID ROOFING CO., INC.	)	
Respondent	)	Docket No. 1,023,273
	)	
AND	)	
	)	
ST. PAUL TRAVELERS INS. CO. and LIBERTY MUTUAL INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent, Nancy & Nora Flores D/B/A L&F Originals, LLP (L&F), and its insurance carrier, St. Paul Travelers Insurance Co. (St. Paul), requested review of the March 22, 2006, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The Administrative Law Judge (ALJ) found that claimant's testimony tended to prove he was temporarily totally disabled from March 17, 2005, until he was discharged from medical treatment on July 28, 2005. The ALJ also found that the evidence so far showed that claimant's average weekly wage was $500. In a prior preliminary hearing Order entered on December 1, 2005, the ALJ had found that L&F and St. Paul had the liability for claimant's work-related accident. Accordingly, the ALJ, in his preliminary hearing Order of March 22, 2006, ordered L&F and St. Paul to pay claimant temporary total disability benefits for the period from March 17, 2005, through July 28, 2005, at the rate of $333.35.

L&F and St. Paul argue that the ALJ exceeded his jurisdiction in finding claimant was entitled to temporary total disability compensation for the period of March 17 to July 28, 2005, because (1) claimant is an illegal alien, (2) the record does not support a finding

of temporary total disability for that period of time, and (3) the record does not support a finding of an average weekly wage of $500.

Claimant argues that his status as an illegal alien does not prevent him from being entitled to temporary total disability compensation and that his testimony is sufficient evidence to uphold the ALJ's decision that he was temporarily totally disabled from March 17 to July 28, 2005, and that his average weekly wage was $500.

Respondent Pyramid Roofing Company and its insurance carrier, Liberty Mutual Insurance Company, state that it is their understanding that they have no stake in the ongoing case between claimant and L&F and St. Paul.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

It is undisputed that claimant is not in the United States legally. He does not have a work permit or a Social Security number. He was employed by L&F to perform a roofing job in Missouri. The contract to perform the work was formed in Kansas.[1] On the first day of the roofing job, March 17, 2005, claimant fell two stories off the roof and fractured both his wrists.

At claimant's deposition taken on July 18, 2005, he testified that he was to return to the doctor on July 28, 2005, at which time he was going to be discharged from treatment. Claimant stated that the doctor told him that he should only pick up things that were light and did not bother him to pick up. At the time of his deposition, he had not returned to work because his hands still hurt. He admitted that on roofing jobs, there is clean-up work involved. However, he was not sure he had the strength to pick up a lot of trash.

Claimant testified that he expected to be paid $110 or $120 for the job. He testified the crew of four was to be paid $45 per square, and they had hoped to complete the job in one day. Claimant also testified that on similar jobs he had worked with the same crew, he made $500 per week, more or less.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an

[1] See *Zepeda v. Nancy & Nora Flores d/b/a L&F Originals, LLP*, No. 1,023,273, 2006 WL 328227 (Kan. WCAB Jan. 27, 2006).

administrative law judge exceeded his or her jurisdiction.[2] This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[3]

The issues of whether a worker satisfies the definition of being temporarily and totally disabled and average weekly wage are not jurisdictional issues listed in K.S.A. 44-534a(a)(2). Additionally, these issues of whether a worker meets the definition of being temporarily and totally disabled and what is the appropriate compensation rate for payment of temporary total disability benefits are questions of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[4]

As the ALJ had the jurisdiction and authority to determine the average weekly wage and grant temporary total disability benefits at the preliminary hearing, the Board does not have jurisdiction to address these issues at this juncture of the proceedings. When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[5] Accordingly, respondent and carrier's appeal of these issues is dismissed.

The respondent may preserve these issues for final award as provided by K.S.A. 44-534a(a)(2). That statute provides in pertinent part:

> Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

Respondent also raises an issue regarding the claimant's status as an illegal alien and/or undocumented worker. In short, respondent contends that because of claimant's

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[2] K.S.A. 2005 Supp. 44-551.

[3] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 674, 994 P.2d 641 (1999).

[4] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[5] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

status, there was no valid contract of hire between claimant and respondent. As such, the relationship of employer and employee did not exist and the Workers Compensation Act does not apply to claimant's accident and injury. This defense goes to the compensability of the claim and is, therefore, an issue that the Board has the jurisdiction to review on an appeal from a preliminary hearing order.

Respondent argues that an undocumented alien cannot lawfully contract for hire and, therefore, cannot satisfy the definition of "employee" under the Act. It is respondent's contention that claimant's contract for hire is void and unenforceable. K.S.A. 2005 Supp. 44-508(b) defines "workman," "employee," and "worker" as "any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer." The only reference to legal or illegal employment is in connection with minors. K.S.A. 2005 Supp. 44-508(b) does not specifically exclude illegal aliens; therefore, it is reasonable to infer an inclusion of illegal aliens as employees.

The vast majority of court rulings in other states have found that an illegal alien is an employee when the statutory language does not specifically exclude illegal aliens.[6] In *Dowling*,[7] the Supreme Court of Connecticut stated that "the legislature's use of the term 'any person' . . . rather than 'a person,' . . . strongly suggests an intent to include all workers, rather than only workers legally present in this country."

In *White*,[8] which pertains to employment contracts of interstate carriers under the Federal Employers' Liability Act, the Kansas Supreme Court held that the alleged fraud in the procurement of an employment contract does not change the employee-employer relationship in connection with workers compensation benefits. Only if the alleged fraud is in connection with the injury is there a defense against awarding benefits.

In addition, Larson[9] states that even if the employment contract is illegal in the sense the making of the contract was illegal, workers compensation benefits should still be allowed. However, if the employment contract was made to carry out some type of illegal employment, then compensation benefits should be denied. In the case at hand, the making of the employment contract may be deemed voidable because claimant is an illegal alien who technically could not be employed in the United States under federal immigration and employment laws. Based on Larson's view, however, the claimant should still be allowed workers compensation benefits despite the fact the contract was made

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[6] See Jason Schumann, *Working in the Shadows: Illegal Aliens' Entitlement to State Workers Compensation*, 89 Iowa L. Rev. 709 (2004); 3 *Larson's Workers' Compensation Law* § 66.03 (2005).

[7] *Dowling v. Slotnik*, 244 Conn. 781, 802, 712 A.2d 396, 407 (1998).

[8] *White v. Thompson*, 181 Kan. 485, 312 P.2d 612 (1957).

[9] 3 *Larson's Workers' Compensation Law* § 66.01 (2005).

illegally. In *Fernandez-Lopez*,[10] the respondent argued that the claimant was an illegal alien and therefore his employment contract was illegal since it was against federal law for him to be employed in the United States. The court, however, stated: "Whatever superficial appeal this logic might have, the argument is clearly contrary to the existing authorities. . . . *[A]n undocumented alien's employment is valid, so long as the work he contracts to do is legal.*"[11] (Emphasis added.)

This line of thinking was also followed in *Lang,*[12] in which the court was faced with deciding whether an employment contract was illegal and void as between an employer and illegal alien who falsified employment papers. The court held that federal immigration laws do not pertain to workers compensation cases and do not play into whether the employment contract is, in fact, illegal or void. The court also held that whether an award is made under the workers compensation act is purely statutory, and whether illegal aliens should or should not be allowed workers compensation benefits is a matter for the legislature to decide. Therefore, since the state's workers compensation act did not specifically exclude illegal aliens from its definition of "employees" who are entitled to benefits, the court allowed the illegal alien to receive benefits despite respondent's arguments that the employment contract was illegal. Likewise, in *Artiga*,[13] the court allowed an illegal alien to receive workers compensation benefits despite respondent's arguments that the employment contract was illegal and void due to claimant's misrepresentations and fraud in obtaining employment.

The Board has previously held that illegal aliens are "employees" under the definition of K.S.A. 2005 Supp. 44-508(b).[14] The Board is not persuaded that its prior determinations on this issue were wrong or should be altered.

In the alternative, even if the Act applies, respondent cites the Board's decision in *Martinez*[15] in support of the proposition that illegal aliens are not entitled to temporary total disability.

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[10] *Fernandez-Lopez v. Jose Cervino, Inc.*, 288 N.J. Super. 14, 671 A.2d 1051 (N.J. Super. A.D. 1996).

[11] *Id.* at 19-20.

[12] *Lang v. Landeros*, 918 P.2d 404 (Okla. App. 1996).

[13] *Artiga v. M.A. Patout and Son*, 671 So.2d 1138 (La. App. 3 Cir. 1996).

[14] See *Rodriguez v. MPS Group, Inc.,* No. 162,402, 1999 WL 571177 (Kan. WCAB July 22, 1999); *Cordova v. Spice Merchant & Co.*, No. 192,123, 1997 WL 803454 (Kan. WCAB Dec. 22, 1997).

[15] *Martinez v. Gilmore Roustabout Service*, No. 1,002,214, 2003 WL 22704164 (Kan. WCAB Oct. 17, 2003).

In *Martinez*, the Board held that an illegal alien's permanent partial disability award is limited to that person's percentage of permanent impairment of function. A higher work disability award was denied because an illegal worker does not have access to the open labor market.

> In theory, the formula for permanent partial general disability measures both the wage loss and task loss that a worker incurs due to a work injury. Under that formula, the availability of work in the open labor market has a significant effect on a worker's permanent partial general disability rating. That statutory scheme, however, presupposes that workers may legally work in the United States.
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> But injured employees who cannot legally work in the United States cannot legally return to work for their employers and, theoretically, do not have the ability to find other work in the open labor market. Consequently, in order for those injured employees to make a good faith effort to seek other employment they must further violate the law. Consequently, comparing pre- and post-injury earnings for an illegal worker fails to quantify the extent of wage loss caused by the injury at work.
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> A primary goal of the Workers Compensation Act is to return injured employees to work. Under K.S.A. 44-510e, the Act encourages employers to accept their injured employees back to work as the permanent partial general disability is limited to the whole body functional impairment rating when the employee returns to work earning at least 90 percent of the pre-injury wage. But when the employee cannot legally work in the United States, the employer cannot return the employee to work without violating the law.
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> The work disability formula is premised upon an open labor market and an illegal worker does not have access to that market. Accordingly, the Board concludes that an illegal worker's permanent partial general disability should be measured by the worker's whole body functional impairment rating.[16]

Unlike work disability, temporary total disability compensation is not tied to the open labor market. Instead, it is based upon claimant's physical condition or ability, and the compensation rate is based upon what claimant was earning with the respondent. To deny temporary total disability compensation would be inconsistent with the purpose of replacing those former wages while claimant is physically incapable of working due to the effects of an injury suffered on the job. As the Act is held to apply to the claimant, temporary total compensation may be awarded whenever appropriate.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Kenneth J. Hursh dated March 22, 2006, is affirmed.

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[16] *Id.* at 5. See also *Amador v. Mid-Am Building Supply, Inc.*, No. 1,005,797, 2006 WL 328205 (Kan. WCAB Jan. 13, 2006).

IT IS SO ORDERED.

Dated this _____ day of June, 2006.

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BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Randall W. Schroer, Attorney for Respondent Nancy & Nora Flores d/b/a L&F Original, LLP, and its Insurance Carrier St. Paul Travelers Insurance Company
Caleb M. Kirwan, Attorney for Respondent Pyramid Roofing Company and its Insurance Carrier Liberty Mutual Insurance Company
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director